DOCUMENT RESUME

ED 375 736 HE 027 831

AUTHOR	Barber, Charles K.
TITLE	What To Do When OSHA Comes Calling.
INSTITUTION	National Association of Coll. and Univ. Attorneys, Washington, D.C.
PUB DATE	May 91
NOTE	14p.
AVAILABLE FROM	National Association of College and University Attorneys, One Dupont Circle, N.W., Suite 620, Washington, DC 20036 ($6.50).
PUB TYPE	Guides - Non-Classroom Use (055)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Administrator Guides; Administrator Role; College Administration; *Colleges; Compliance (Legal); Higher Education; *Inspection; Institutional Role; Law Enforcement; *Legal Problems; *Occupational Safety and Health; *School Safety; *Universities
IDENTIFIERS	*Occupational Safety and Health Administration

ABSTRACT

This booklet explains the actions that college or university administrators should take if their institution is subject to an inspection by the Occupational Safety and Health Administration (OSHA) for possible health or safety violations. After providing a fictional case study and an explanation of the OSHA inspection process, the booklet reviews procedures that institutions should follow. Institutions should: (1) have in place a policy regarding warrantless inspections; (2) ask OSHA what prompted the inspection; (3) set conditions for the inspection; (4) establish control over the inspection; (5) volunteer little if any information to the inspector; (6) if necessary, halt the inspection to consult with counsel; (7) before the inspectors leave, ask what they plan to report; (8) begin preparing a response as soon as the inspection is completed; (9) review any citations carefully; (10) if a citation is issued, request a conference with the OSHA Area Director; (11) contest citations if there is reason to believe they are in error; and (12) where appropriate, settle the OSHA claim and include exculpatory language in the settlement. (MDM)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED375736

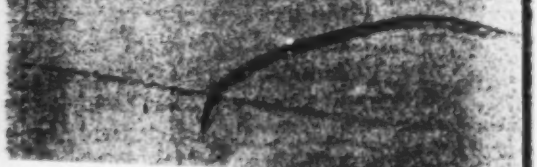
HE027831

NACUA

THE PUBLICATION SERIES

What To Do When OSHA Comes Calling

CHARLES K. BARBER



"PERMISSION TO REPRODUCE THIS MATERIAL IN OTHER THAN PAPER COPY HAS BEEN GRANTED BY

NACUA

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)"

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

National Association of College and University Attorneys

BEST COPY AVAILABLE

What To Do When OSHA Comes Calling

Case Study

Inspector Clouseau, a compliance safety and health inspector of the Occupational Safety and Health Administration ("OSHA"), arrives one day at the office of the Dean of the College of Liberal Arts at Hazard University. Inspector Clouseau requests permission to conduct an inspection of the Biology Department and related laboratories to determine whether University employees are being exposed to dangerously high levels of certain chemicals. The Dean seeks the advice of the President's office about how to respond. While the President deliberates, the Chairman of the Biology Department—reasoning that he has nothing to hide—agrees to take the inspector on a tour of the Biology laboratories. Inspector Clouseau makes notes, photographs a few laboratory workplaces, and takes certain measurements with a hand-held instrument.

After the inspection, a closing meeting is held among the Biology Department Chairman, a representative of the Dean's office and Inspector Clouseau. The inspector states that he is concerned about the exposure to University employees of certain suspected carcinogens used regularly in the Biology labs which have been the subject of recently promulgated OSHA standards. He asks to see copies of certain data, including the University's Hazard Communication policy, Material Safety Data Sheets ("MSDS") on the suspected carcinogens, and any internal records kept of reported illnesses by employees of the Biology Department. Some information is provided, but the records are incomplete. According to his preliminary analysis, says the inspector, the exposure levels of certain chemicals are too high. He then says that he needs to review the data more fully and that "he will be in touch."

Two weeks later, the Dean's office receives, by registered mail, citations and proposed penalties relating to the chemicals which were the focus of the investigation. The University is

Charles K. Barber is Deputy General Counsel of Howard University. Prior to assuming his current position, he was a law clerk to a U.S. District Judge for the Southern District of Texas and an Associate in the New York law firm, Debevoise & Plimpton. Mr. Barber received both his B.S., *summa cum laude*, and his J.D., *magna cum laude*, from Howard University, where he was Executive Articles Editor for the *Howard University Law Journal*.

The views expressed herein are to be attributed to the author and not to the National Association of College and University Attorneys. The information appearing in this publication is presented for information purposes only and should not be considered legal advice or be used as such. For a specific legal opinion, readers should confer with their own legal counsel.

May 1991

© 1991 National Association of College and University Attorneys

Printed in the United States of America

also cited for its failure to maintain required records and to train employees properly in the use of the chemicals. The citations and proposed penalties for each violation are followed by recommended abatement measures, some of which could be more costly than the penalties. The citations state that they must be posted "in a prominent place at or near the location of the" cited violations and "must remain posted until the violations... have been abated, or for 3 working days (excluding weekends and Federal holidays) whichever is longer." The letter from the Area Director states that the University has 15 working days in which to notify his office whether or not it will contest the citations and penalties.

The OSHA citations are forwarded to the University President who turns to you for advice. How should you respond?

As the case study points out, inspections by OSHA have increasingly opened up colleges and universities to scrutiny under the Occupational Safety and Health Administration Act of 1970.[1] Pursuant to the Act, OSHA is authorized to investigate—with no advance notice—suspected safety hazards and violations of its regulations for all employment facilities under its jurisdiction. Since OSHA's jurisdiction is limited in general only by the broad requirement that the facility be engaged in interstate commerce, almost all colleges and universities could find themselves in the position of Hazard University, facing several citations and penalties with an insufficient time in which to respond. In answering the request for advice, at a minimum your response should focus on what Hazard University should have done when Inspector Clouseau first arrived, and what the University can do now to address the citations.

Consent to the Inspection

The Act provides specifically that an OSHA representative "upon presenting appropriate credentials is authorized...to enter without delay and at reasonable times any" work-place.[2] Although not stated in the Act, an employer has a Constitutional right to refuse entry to the OSHA inspector. In fact, since 1978, courts have held that, under the Fourth Amendment right against unreasonable searches and seizures, OSHA may not conduct an inspection without first obtaining a search warrant when the employer denies its consent to an inspection.[3] Thus, in the case study, Hazard University has a right to refuse Inspector Clouseau's request to inspect the Biology laboratories.

OSHA, however, can usually obtain a search warrant without much delay, under some circumstances through an *ex parte* proceeding.[4] Indeed, the vast majority of employers consent to the inspection and never require a search warrant. Consent by the employer will be deemed to have been given when expressed by an agent who has the apparent authority to control access to the premises to be inspected.[5]

Depending on the policies and practices of Hazard University, it may well be that a court would conclude that the Chairman of the Biology Department did in fact have the authority to consent on behalf of the University to an inspection of his Department. Notwithstanding, before Inspector Clouseau was admitted, the question facing Hazard University—and for that matter all employers—is whether the employer should withhold its consent to the proposed inspection.

There are pros and cons to refusing permission to an OSHA inspection that all employers should consider. The advantage of a search warrant to an employer is that it limits the scope of the search, since it will specify the time period when the search must take place and the work areas that can be searched. Thus, an OSHA inspector will not have *carte*

1. The Occupational Safety and Health Act of 1970, 29 U.S.C. Sec. 651 *et. seq.* (1970) (the "Act").

2. 29 U.S.C. Section 657 (a).

3. *Marshal v. Barlow's, Inc.*, 436 U.S. 307 (1978).

4. 29 C.F.R. 1903.4 (1990).

5. *Western Waterproofing Company, Inc.*, 4 O.S.H. Cases 1301 (Rev. Comm. 1976); *Tobacco River Lumber Company*, 3 O.S.H. Cases 1059 (Rev. Comm. 1975).

blanche to search a work site but, instead, will have to limit the search according to the terms of the warrant. In addition, there is the possibility that OSHA may decide—on the basis of limited manpower, budget or enforcement priorities—that once entry is refused it will simply forego the inspection altogether.[6]

On the other hand, some argue that there is little advantage in gaining the short delay that usually results from refusing a requested inspection. Notwithstanding the Constitutional right not to consent, some employers believe that asserting that right will cost them the good will of the OSHA inspector, since the inspector does have some latitude in the penalties proposed in connection with any citation. By refusing to admit the inspector without a warrant, some argue, the employer risks greater penalties as a result of its perceived lack of cooperation.[7]

Obviously, it is up to each employer to decide how it will respond when confronted with this type of situation. Given the relatively short time frame that an employer has to make that decision, all institutions would be well advised to develop in advance a formal policy on warrantless searches. If for no other reason, having such a policy already established is less likely to present the appearance of an attempted cover-up and more like a principled stance than would an ad hoc decision made the day the OSHA inspector arrives. (Thus, you should advise the President of Hazard University to adopt such a policy and to distribute copies to all deans and department heads.) If a search is permitted without a warrant, at the very least Hazard University should condition its consent to specific restrictions on the scope of the inspection, including the amount of time in which the inspection is to be conducted, the areas to be inspected, and the specific hazards, violations or chemicals to be inspected.

6. *See generally* R. MORAN, OSHA Handbook at 6-18 to 6-22 (2nd ed. 1989).

7. W. CONNALLY & D. CROWELL, *A Practical Guide to the Occupational Safety and Health Act*, §3.03 (1988).

Information acquired during an OSHA inspection may be obtained and used against an employer in a subsequent criminal or civil lawsuit and thus special care should be taken in cases involving accidents that result in serious injuries or fatalities. Furthermore, increased penalties mandated by Congress[8] and a newly revised OSHA enforcement scheme,[9] require OSHA to assess the employees significantly higher penalties in such situations.

In light of the potential for increased liability, the employer should seriously consider exercising its right to refuse its consent, thereby requiring OSHA to obtain a search warrant, in the event of a fatality or serious injury. The fact that an injury or fatality has occurred is not a sufficient basis, without more, to authorize the issuance of a warrant. If OSHA cannot demonstrate that it is entitled to a warrant under one of the two theories described below, the employer may be able to avoid altogether a search that could increase its risk of liability.

Why was Hazard University Singled Out?

Hazard University officials may well wonder why their institution was singled out for inspection. Indeed, they have a right to know and the OSHA inspector is obligated to inform them upon request. OSHA cannot arbitrarily target an employer for an inspection either on a "hunch" that a violation has been committed or with the intent to harass a particular employer. OSHA is permitted to conduct an inspection only if 1) the particular establishment was selected on the basis of a general administrative plan derived from neutral sources, or 2) OSHA possesses specific evidence that the establishment contains an existing violation of law. If OSHA seeks to obtain a search warrant after the employer refuses its consent it will have to satisfy one or both of these criteria by the standard of probable cause.[10]

8. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990).

9. *See* OSHA Instruction CPL 2.80, Directorate of Compliance Programs, October 1, 1990.

10. *Marshall v. Barlow's, Inc.*, 436 U.S. at 320.

The first type of inspection is known as a "programmed" inspection. Courts will uphold a search based upon a general administrative plan so long as 1) the warrant application contains a description of the administrative investigation program on which it is based, and 2) the particular inspection fits within that program.[11] There is no consensus among the courts as to what constitutes such a plan. In practice, OSHA has not one but many different plans, based in part upon a ranking of industries by their lost workday injury rate.[12] OSHA can be required, however, to explain how the plan that led to a particular inspection was developed to ensure that inspections are neutral with respect to any specific employer.

The second type of inspection, known as an "unprogrammed" inspection, requires OSHA to possess specific evidence sufficient to establish probable cause that an OSHA violation has occurred. Frequently, the evidence will be a written complaint received from an employee. OSHA can be required to show that the complaint was actually made by an employee, that the employee alleges a condition which would constitute a violation of law, and that OSHA has good reason to believe that the complaint is genuine.[13] Upon request, OSHA is required to provide a copy of any such letter to the employer, with the name of the employee deleted.

In either type of inspection, the standard of probable cause will determine OSHA's right to conduct the inspection. Probable cause in these types of cases is less strict than the standard used in criminal cases. Administrative probable cause permits more flexibility than the standard applied in the criminal context.[14]

11. *Northwest Airlines, Inc. v. Marshall*, 587 F.2d 12 (7th Cir. 1978).

12. MORAN, *supra* note 6, at 6-12 to 6-15.

13. *See Marshall v. Horn Seed Co.*, 647 F.2d 96 (10th Cir. 1981).

14. *See Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1318 (7th Cir. 1980).

The Inspection Process

A typical inspection begins with an opening conference during which the inspector should first present his or her credentials. The inspector should then state the reason for the inspection (although, if he or she does not, the employer should ask). If the inspection is unprogrammed, the employer should request to see the specific evidence (e.g., a complaint from an employee) that OSHA believes establishes probable cause that the employer has violated an OSHA regulation. OSHA must provide the employer with a copy of such evidence, with the name of the employee or other source withheld. If the inspection is a programmed search, the employer should request a description of the general administrative plan. At this point, if the answers the employer receives are unsatisfactory, the employer can insist on a search warrant.

If, on the other hand, the employer gives its consent and the inspection proceeds, the employer should seek to maintain control over how it is conducted. During the opening conference, the ground rules of the inspection should be established and any conditions to the consent should be clearly articulated. The employer should put these conditions in writing, have the inspector sign the document, and keep a copy as a matter of record.

Before the opening conference is concluded, the employer should explain its safety program. Copies of written policies and procedures for maintaining safe working conditions should be provided to the inspector with an explanation of how they are enforced. The employer also should discuss any preventive measures recently initiated to provide greater safety. The opening conference should be viewed as an opportunity to demonstrate to the inspector that the employer is safety conscious.

Before further advising Hazard University, you should determine: 1) whether an opening conference was held and whether Inspector Clouseau followed the proper procedures; and 2) whether the inspector provided any information as to why Hazard was selected for in-

spection. If information was provided, it should be reviewed to determine whether it meets the requirements of probable cause. If no information was provided, you should immediately ask OSHA in writing for such information. You should furthermore request that OSHA respond well before the expiration of the time period for deciding whether to contest the citation so that your evaluation of the information can be factored into your decision.

Walkaround

Following the opening conference, the inspector will conduct the physical inspection by walking around the premises. The degree of scrutiny during any given walkaround may vary depending on the type of inspection (health or safety violation), what prompted it (complaint or general administrative plan), any information the inspector has received up to that point, and the motivations of the particular inspector.[15]

Representatives of the employer should accompany the inspector at all times. A senior official who is responsible for safety at the site and who is familiar with OSHA regulations should be present. In addition, a maintenance man should be readily available to fix any minor problems. Lastly, someone on the employer's staff should take notes of the inspection. These notes normally would not be made available to OSHA; however, the employer may be compelled to produce them should there be subsequent litigation. The inspector may request that a union representative also be included if employees on the site are represented by a union.

The employer's representatives should volunteer little, if any, information. In particular, the employer should not discuss past conditions or violations, and areas not included with the original consent or search warrant should not be volunteered for inspection. All such information can—and frequently will—be used against the employer in a subsequent citation and enforcement proceeding. Even information observed by the inspector outside the scope of the consent or warrant can be used—the so-called "plain view" exception to the warrant requirement.[16]

Physical evidence taken by the inspector should be one of the subjects of the negotiated consent or the search warrant. If photographs are taken by the inspector, as were taken by Inspector Clouseau, the employer should request that OSHA also provide copies to the employer. The employer, however, should also take its own photographs, similar to OSHA's, but include a few from different perspectives. If the inspector takes samples or undertakes some form of monitoring, the employer should request him or her to specify the procedures and technical instruments used, the date and method of calibration, and the number and locations at which the samples were taken or the monitoring conducted. As with photographs, the employer should request OSHA not only to provide a duplicate of both the samples taken and results of any monitoring, but it should undertake its own collection of samples and conduct its own monitoring.[17]

The inspector will probably request to see certain records maintained by the employer, as did Inspector Clouseau. The employer should produce *only* those records which it is required by the Act to maintain. These include the employer's written Hazard Communication Policy,[18] MSDS sheets,[19] and the records pertaining to occupational illnesses and injuries.[20] Other records maintained by the employer, such as internal accident reports, should not be provided. When in doubt, the employer should ask the inspector to cite the regulatory basis for the request and then consult with counsel before complying.

If, at any time during the walkaround, the employer's representatives are uncertain as to how to respond to a request by the inspector or to an issue presented during the inspection,

15. MORAN, *supra* note 6, at 6-24.

16. *See Concrete Construction Co.*, 10 O.S.H. Cases 1622 (Rev. Comm. 1982).

17. CONNALLY & CROWELL, supra note 7.

18. 29 C.F.R. 1910.1200(e) (1990).

19. 29 C.F.R. 1910.1200(g) (1990).

20. 29 C.F.R. 1904.2 (1990) (also known as OSHA Form No. 200).

the representatives can and should delay the inspection while they consult with counsel. The inspector may be asked to merely wait until after the consultation, or continue some undisputed part of the search, until the delay is over.

Closing Conference

The closing conference is an integral part of the inspection. Usually, it follows immediately after the walkaround but it may be delayed until the results of any sampling or monitoring are available. During the conference, the inspector will summarize what has been observed and what may happen by way of a citation.

The employer should question the inspector closely concerning the basis of any recommended citation because, while the inspector is usually authorized only to make recommendations regarding citations to the OSHA Area Director, in most instances those recommendations are followed. The employer additionally should compare its notes with those of the inspector, pointing out any discrepancies. The employer should also attempt to determine how knowledgeable the inspector is of the employer's business and make notations of any gaps in that knowledge. Finally, the employer should ask the inspector what would be necessary by way of abatement and what he or she thinks about the cost and feasibility of such measures.

Consistent with the employer's approach during the entire inspection, the employer should admit nothing during the closing conference and avoid supplying the inspector with additional information. The majority of citations are reportedly issued by OSHA on the basis of employer-supplied information, rather than the independent observations of the inspector.[21] The closing conference is the best time for the employer to determine what information the inspector has and how it may be used in a citation against it. Such advance knowledge will also help the employer prepare for the coming citation—and help avoid the pitfall faced by Hazard University of having too little time to prepare before having to decide whether to contest a citation.

21. MORAN, *supra* note 6, at 6-25.

Issuance of the Citations

The Occupational Health and Safety Act provides that if OSHA believes that an employer has violated one of its regulations or standards, it must issue a citation "with reasonable promptness."[22] Exactly what constitutes "reasonable promptness," however, is not clearly defined. It usually depends on the circumstances, including the need to wait for reports of the conclusion of any test or monitoring.

A citation not issued timely may be challenged by the employer, but usually the employer will have to show some prejudice. In the case study, Hazard University would probably not have cause to challenge the two-week delay in the issuance of the citation. On the other hand, the same is not true where the citation is issued more than six months after an alleged violation. The Act contains an absolute bar—or a special statute of limitations—for offenses more than six months old.[23]

It is important to remember that a citation is not a conviction; it is simply an allegation by OSHA that the employer has violated one of its standards. The citation is usually accompanied by a proposed penalty which, as a "proposal" is also not set in stone; both may be easily contested. However, as pointed out below, if the citations are not contested within 15 working days, they will become final and the penalties will then be "assessed."

Under the Act, all citations—in addition to being issued promptly—must also 1) be in writing, 2) describe the nature of the violation, 3) include a reference to the OSHA requirement and 4) state a reasonable time for abatement.[24] There are four different kinds of violations. The elements of proof vary for each one.

22. 29 U.S.C. §658 (a).
23. 29 U.S.C. §658 (c).
24. 29 U.S.C. §658 (a).

as do the monetary penalties. Under the Omnibus Reconciliation Act of 1990,[25] the monetary penalties for each violation were increased substantially.

Willful Violations. Under case law, an OSHA violation is considered willful where the employer acted voluntarily with either an intentional disregard or a plain indifference to the Act's requirements. Generally, it must be shown that the employer knew both the facts which constitute the violation and the law setting forth the standards.[26] Formerly, a willful violation, as well as a repeat violation, were punishable by a civil penalty of not more than $10,000 for each violation.[27] Under the new law, the maximum penalty has been increased to $70,000.

Serious Violations. A serious violation is the only violation defined in the Act.[28] It is:

> deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

The elements of proof of a serious violation include a significant risk of harm and the employer's knowledge of the condition, but—unlike the willful violation—they do not include the employer's knowledge of the legal obligation to abate the condition. Formerly, the maximum penalty for a serious violation was $1,000.[29] Now, the maximum penalty is $7,000.

25. *See supra* note 8.

26. *See Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419 (D.C. Cir. 1983).

27. 29 U.S.C. §666(a). If an employer willfully violates a standard and that violation causes a death, the employer can be fined $10,000, or imprisoned for not more than six months, or both. 29 U.S.C. §666(e). For subsequent convictions, an employer can be fined $20,000, or be imprisoned for not more than one year, or both. *Id.*

28. 29 U.S.C. §666 (j).

29. 29 U.S.C. §666 (b).

Nonserious Violations. Nonserious violations, also called "other" violations, involve a condition that fails to comply with an OSHA standard, but does not constitute a substantial probability of death or serious physical harm.[30] The Act provides a maximum penalty of $1,000.[31] In the past, penalties were frequently not assessed for nonserious violations, particularly for first instance offenders. The maximum penalty is now $5,000, and it is unclear under the new regulatory enforcement scheme whether OSHA will continue to refrain from proposing a penalty for first offenders of these types of violations.

Failure to Abate. Where a citation has been issued and affirmed, and the employer fails to take the required corrective action, the Act provides that the employer may be cited for a separate violation.[32] The alleged unabated violation, however, must be identical to the one in the original citation. Formerly, the maximum penalty was $1,000 for each day the violation continues. Now, a minimum penalty of $5,000 is required, the first time a minimum penalty has been included as part of the OSHA enforcement penalties.

Another recent change in OSHA enforcement procedures may have a dramatic impact on the total amount of proposed penalties an employer might be subjected to following a single inspection. OSHA's practice formerly was to group together similar violations and propose one penalty for the group. Under a recent directive,[33] OSHA will now allege a separate violation and penalty for each flagrant violation. This one penalty per violation procedure will be adopted in cases involving injuries or fatalities, a past history of willful violations, a large number of violations, or conduct constituting bad faith.

Regardless of the type of violation alleged, OSHA is required to "describe with particularity the nature of the violation."[34] OSHA uses

30. *See Secretary v. Keco Industries, Inc.*, OS.H. Cases 1832, 1834 (Rev. Com. 1984).

31. 29 U.S.C. §666 (c).

32. 29 U.S.C. §666 (d).

33. *See supra* note 9.

uniform language to describe the violation that frequently does not provide the kind of particularity that might be expected.[35] Such uniform language is known as "alleged violation descriptions" ("AVDs") or "standard alleged violation elements" ("SAVEs") which are intended to address each OSHA standard. For example, with respect to the citation against Hazard University regarding the lack of the MSDS for each chemical, the citation would probably read:

> 29 CFR 1910.1200(g) (1): Employer did not have a material safety data sheet for each hazardous chemical which is used in the workplace:
>
> (a) [Additional information provided]

The only variation in the citation will be in the words after "(a)" in which the specific location, chemicals and other material information might be included.

The problem arises in instances where the information provided after "(a)" is not specific enough. Courts have held that the "[c]itations must give fair notice to the employer so that it understands the charge being made and has an adequate opportunity to prepare and present a defense."[36] In essence, the citation should inform the employer "precisely what he did wrong and what he must do to cure the violation."[37] The employer must decide if in fact the citation gives notice—without ambiguity—of exactly what the violation is and what now needs to be done to abate it. If it is at all unclear, the employer has the option of requesting additional information at an informal conference or contesting the citation.

Response to the Citation

Upon receipt of the citation, the employer must post it (but not the notice of penalty) at or near the place where each violation occurred for three working days, or until the violation is corrected, whichever is longer.[38] This posting, giving employees notice of the alleged hazards, must be done even if the citation is contested. Thereafter, the employer is required to respond within 15 days of receipt of the citation, not counting Saturdays, Sundays and Federal holidays.[39] The employer could respond to a citation in one of three ways:

1. The employer could agree to the citation and notice of penalty, correct the condition by the date set in the citation, and pay any penalty proposed.
2. The employer could decide to contest the violation, as discussed below.
3. The employer could do nothing for 15 working days.

The result of option number three, i.e., not contesting the citation within the 15 working-day limit, is to allow the citation to become final and binding on the employer; it cannot then be reviewed by any court or agency.[40] A failure to act is the equivalent of a guilty plea in this instance and will result in a "conviction" as an OSHA violation.

Contesting the OSHA citation—option number two—is a simple process. Prior to the expiration of the 15 working-day time period, the employer sends a letter with a simple declaration that it contests the specific citation issued.[41] The letter can contest the citation or the abatement date separately; however, if no distinction is made everything in the citation is deemed contested. On the other hand, a contest to the citation will not include a contest to the penalty; therefore, a separate declaration of contest to the penalty should be included if the employer wishes to challenge that as well. No reasons must be given for the contest and the letter need not be sent by registered or certified mail (although if it is close to the deadline the employer might want a return receipt as evidence of meeting the statutory 15 working-day time period).

---

34. 29 U.S.C. §658 (a).
35. MORAN, *supra* note 6, at 7-12 to 7-16.
36. *See, e.g., Babcock & Wilcox Co. v. OSAHRC*, 622 F.2d 1160, 1164 (3rd Cir. 1980).
37. *Noblecraft Industries, Inc. v. Secretary of Labor*, 624 F.2d 199, 206 (9th Cir. 1980).
38. 29 U.S.C. §658 (b) and 29 C.F.R. 1903 (1990).
39. 29 U.S.C. §659 (a).
40. 29 U.S.C. §659 (c).
41. *Id. See also* MORAN, *supra* note 6, at 7-16 to 7-19.

The effect of the contest is to suspend entirely the employer's legal obligation to correct the violation and pay the penalty. Upon receipt of the notice of contest, the OSHA Area Director is required to forward it immediately to the Occupational Safety and Health Review Commission (the "Commission").[42]

A new phase is thus started. The contest initiates a "case" before the Commission, with OSHA acting as one party (the "Complainant") and the employer as the other party (the "Respondent"). An administrative law judge ("ALJ") is assigned to hear the matter during which OSHA will bear the burden of proving its case, while the employer will be presumed innocent of the charges.

If necessary, the ALJ's ruling may be reviewed by the full Commission and, in turn, the Commission's decision may be reviewed by a U.S. Court of Appeals. The employer should bear in mind, however, that it is under no OSHA obligation to pay the penalty or comply with the abatement ordered by OSHA until 1) the Commission decides the case or 2) the matter is settled by an agreement between the employer and OSHA.

If the employer has any reason to challenge either the citation or the penalty—whether because of defects in the warrant procedure, in the inspection process, in the violation cited, or in the abatement ordered—it would be well-served to do so. There are two basic advantages to contesting citations. The first, as already mentioned, is to suspend any legal obligation to pay the penalty or comply with the abatement. During this suspension, it is unlikely that OSHA will reinspect an employer while a case against that employer is pending before the Commission.[43] The second advantage is that the notice of contest is likely to improve the employer's chances of a settlement. After the notice is filed, the Department of Labor attorney handling the matter for OSHA is frequently willing to reduce the penalty, extend the time for abatement or reclassify the citation to a less serious offense.[44]

42. 29 U.S.C. §659 (c).

43. MORAN, *supra* note 6, at 7-18.

Informal Conference

Whether the employer decides to contest or not, it should take advantage of the informal conference OSHA offers with the Area Director to discuss all of the issues related to the citation and penalty. This conference must take place within the 15 working-day period; the time for filing a notice of contest is *not* extended by the informal conference. Therefore, it is advisable for the employer to request an informal conference immediately upon receipt of the citation. OSHA favors the informal conference; its field operations manual not only encourages it, but proscribes the procedures and approach OSHA officials should take toward this end.[45]

During the informal conference, the employer can seek additional information about the citation and can argue its position. Information not previously provided to OSHA can then be offered for consideration and used to persuade OSHA to withdraw, or at least modify, the citation or penalty.

More frequently, the informal conference is used to negotiate a possible settlement. In fact, OSHA also encourages settlements at this stage, although the employer should keep in mind that, if it contests the citation, it has an opportunity to settle anytime before the case is resolved by the Commission. Some believe, moreover, that a better deal can be struck later in the process. In any event, the employer should not be forced into an unfavorable settlement during the informal conference but should be open to the possibilities of a more favorable settlement at some future point.

The final settlement, regardless of when it is made, should include disclaimers that will prevent it from being used against the employer. OSHA usually will agree to such protection and language similar to the following is typically included in the settlement agreement:

> None of the foregoing agreements, statements, stipulations and actions taken by Respondent shall be deemed an admission by Respondent of any of the allegations contained in the citations.

44. *Id.*, at 7-17.

45. OSHA Field Operations Manual, Chapters 3 and 5.

> Respondent specifically denies each such allegation. The agreements, statements, stipulations and actions herein are made solely for the purpose of settling this matter economically and amicably without further litigation and they shall not be used by anyone for any other purpose, except for subsequent enforcement proceedings filed by the Secretary against the Respondent under the Occupational Safety and Health Act of 1970.

The employer should note that if it loses the case—because the employer either fails to take any action before the citation becomes final or contests the citation and loses at the Commission—no such exculpatory language is available. The OSHA conviction then becomes a public record and can be used in a civil suit or for other purposes at any time.

Summary

It should not go without saying that employers have a responsibility to provide a safe working environment for their employees. It is not inconsistent with such responsibility, furthermore, to be familiar with and take advantage of the practices and procedures of the OSHA inspection and citation process as provided in Congressional laws, OSHA regulations and court precedents. Notwithstanding, the best protection against an OSHA enforcement action is to identify and correct hazardous or unsafe working conditions *prior* to an OSHA inspection.

Before OSHA comes calling, all employers should survey their work sites with their internal safety officer, or an outside safety firm, to ensure that such sites meet OSHA standards. This is particularly important for colleges and universities since 1) such worksites tend to be wide ranging, 2) a number of the educational and physical plant functions normally found at such institutions can generate hazardous or unsafe working conditions, and 3) central oversight of all these disparate functions is frequently less strict than with noneducational facilities. In addition, while the Act only protects "employees,"[46] colleges and universities must also be mindful of protecting students from hazardous and unsafe conditions.

Once faced with an OSHA inspection, however, the following points—discussed herein—should be kept in mind.

1. Have in place an institutional policy regarding warrantless searches.
2. Ask the inspector what prompted the search and request copies of materials that OSHA relied on to make the decision.
3. Set conditions for any search, memorialize them in writing, and have the documents signed by the OSHA inspector.
4. Establish control over the inspection by having the proper employees attend, limiting the search to the agreed conditions, and keeping track of what was observed, monitored, or measured.
5. Inform the inspector of your safety program, but volunteer little if any additional information.
6. When necessary, halt the inspection and consult with counsel regarding any issues which arise.
7. Before the inspector leaves, ask what his or her recommendation will be by way of citation, penalties and abatement.
8. Begin preparing your response to any expected citation immediately after the inspection.
9. Review any citation carefully to determine whether the alleged violation is described with sufficient particularity so you know what action must be taken to remedy it.
10. Immediately after a citation is issued, request an informal conference with the OSHA Area Director to obtain additional information and to explore the possibility of a settlement. Schedule the conference early in the 15-day response time so that there will be enough time to file a notice of contest if the matter is not settled during the conference.
11. File a notice of contest before the expiration of 15 working days whenever there is

46. See 29 U.S.C. §§651, 652(6) and 653.

reason to believe that any part of the inspection or citation process is defective.

12. Where appropriate, settle the OSHA claim and include exculpatory language in the settlement.

Also Available from NACUA

Brochures

Complying with "Drug-Free Workplace" Laws. *$6.50*

Risky Business: Risk Management, Loss Prevention and Insurance Procurement. *$6.50*

The Dismissal of Students with Mental Disorders. *$6.50*

Defamation Issues in Higher Education. *$6.50*

Technology Transfer and Risk Management. *$6.50*

Peer Review Confidentiality: Is It Still Possible? *$6.50*

A Guide to Copyright Issues in Higher Education. *$6.50*

Access to Institutions of Higher Education for Students with Disabilities. *$6.50*

Crime On Campus: Analyzing and Managing the Increasing Risk of Institutional Liability. *$9.50*

What To Do When OSHA Comes Calling. *$6.50*

Compendia

College and University Student Records. *$27.50*

Sexual Harassment on Campus. *$27.50*

Regulating Racial Harassment on Campus. *$29.50*

The Practical Aspects of Technology Transfer. *$29.50*

AIDS on Campus. *$32.50*

Intellectual Property on Campus. *$29.50*

Am I Liable? *$25.00*

The Law of Higher Education Update: 1985–1990. *$29.50*

Student Legal Issues. *$22.00*

Legal Issues in Faculty Employment. *$27.50*

Legal Issues in Athletics. *$27.50*

To receive NACUA's Publications Brochure with detailed descriptions of the resources listed above or to place an order, write to NACUA Publications, One Dupont Circle, Suite 620, Washington, D.C. 20036. Prepaid orders only.

National Association of College
and University Attorneys
One Dupont Circle, N.W.
Suite 620
Washington, D.C. 20036
202-833-8390
FAX 202-296-8379

BEST COPY AVAILABLE